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Datuk Kim Kok Khin @ Kim Kok Khen v Tan Ah Tong

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1483–06 OF 2012
RAMLY ALI, DAVID WONG AND ZAWAWI SALLEH JJCA
12 DECEMBER 2013

Civil Procedure — Preliminary issue of law — Issue of limitation — Issue decided by way of O 14A application — Whether judicial commissioner erred in allowing issue of limitation to be reopened at trial after having decided on same issue in O 14A application — Whether appellant was prejudiced

The appellant and respondent entered into a sale and purchase agreement ('the SPA') for the purchase of the respondent's bungalow. When the appellant failed to pay the balance of the purchase price within the stipulated time, the respondent terminated the agreement. However, subsequently the appellant paid the balance of the purchase price and the same was duly accepted by the respondent. Thereafter further disputes arose between the parties that led to the appellant filing a legal action to claim for specific performance of the SPA. At case management the parties were directed to apply by way of O 14A of the Rules of the High Court 1980 to decide on the preliminary issue of law as to whether the appellant's statement of claim was time barred by the Limitation Act 1953 ('Act'). After hearing the parties in the O 14A application, the judicial commissioner ('the JC') found that the appellant's statement of claim was not barred by limitation. Thereafter the action proceeded to trial. At the close of the trial the JC dismissed the appellant's claim on the grounds that the claim was barred by the Act, in that 12 years had passed since the cause of action arose. This was the appellant's appeal against that decision. The appellant submitted that the JC had erred in allowing the issue of limitation to be reopened at the trial after having decided on the same issue in the O 14A application.

Held, allowing the appeal with costs in the cause:

(1) The whole purpose of an O 14A application was to ensure that cases could be expeditiously disposed of by allowing questions of law or construction of any documents to be disposed summarily. The JC had erred in reversing her earlier decision on the issue of limitation of the appellant's cause of action, as she was bound by her earlier finding in the O 14A application (see paras 19–21).

(2) The appellant had been prejudiced by the JC's change of mind. There had been a mistrial and thus the case ought to be remitted back to the High Court for retrial on the premise that the appellant's cause of action was not time barrsed (see paras 22–23).

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[Bahasa Malaysia summary

Perayu dan responden memasuki perjanjian jual beli ('PJB') untuk pembelian banglo responden. Apabila perayu gagal untuk membayar baki harga belian dalam masa yang ditetapkan, responden menamatkan perjanjian tersebut. Walau bagaimanapun, kemudiannya perayu membayar baki harga belian dan ianya diterima oleh responden. Kemudian, pertikaian lanjut berbangkit di antara pihak-pihak yang membuatkan perayu memfailkan tindakan undang-undang untuk menuntut pelaksanaan spesifik PJB. Semasa pengurusan kes pihak-pihak diarahkan untuk memfailkan tindakan undang-undang melalui A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 untuk memutuskan atas isu awalan undang-undang sama ada pernyataan tuntutan perayu dihalang masa oleh Akta Had Masa 1953 ('Akta'). Selepas mendengar pihak-pihak dalam permohonan A 14A, pesuruhjaya kehakiman ('PK') mendapati bahawa pernyataan tuntutan perayu tidak dihalang oleh had masa. Kemudiannya tindakan diteruskan kepada perbicaraan. Di akhir perbicaraan PK menolak tuntutan perayu atas alasan bahawa tuntutan dihalang oleh Akta di mana 12 tahun telah berlalu semenjak kausa tindakan berbangkit. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu berhujah bahawa PK telah tersilap dalam membenarkan isu had masa dibuka semula semasa perbicaraan selepas memutuskan atas isu yang sama dalam permohonan A 14A.

Diputuskan, membenarkan rayuan dengan kos dalam kausa:

(1) Keseluruhan tujuan permohonan A 14A adalah untuk memastikan bahawa kes-kes boleh didengar dengan segera dengan membenarkan soalan undang-undang atau pentafsiran apa-apa dokumen untuk didengar secara ringkas. PK tersilap dalam mengakas keputusannya yang terdahulu atas isu had masa kausa tindakan perayu, kerana dia terikat dengan keputusannya terdahulu dalam permohonan A 14A (lihat perenggan 19–21).

(2) Perayu telah diprejudis oleh perubahan fikiran PK. Terdapat perbicaraan silap dan oleh itu kes patut diremit semula ke Mahkamah Tinggi untuk perbicaraan semula atas dasar kausa tindakan perayu tidak dihalang masa (lihat perenggan 22–23).]

Cases referred to

Hartecon JV Sdn Bhd v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

Legislation referred to

Limitation Act 1953
Rules of the High Court 1980 O 14A

Appeal from Suit No S4–22–329 of 2007 (High Court, Kuala Lumpur)

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WSW Davidson (KY Foo and Foo Siew June with him) (KY Foo & Co) for the appellant.
K Goik (Nasir Kenzin & Tan) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court in which the learned judicial commissioner dismissed the appellant/plaintiff's claim against the respondent/defendant for specific performance of an agreement dated 2 May 1974 on the ground that the claim is barred by the Limitation Act.

[2] We heard the appeal and after giving due consideration to respective counsel's submission and record of appeal we allowed the appeal with costs.

[3] The respondent has now obtained leave to appeal to the Federal Court and to facilitate that appeal we now give our reasons.

BACKGROUND FACTS

[4] The appellant had purchased a bungalow from the respondent through a sale and purchase agreement dated 2 May 1974 ('the agreement') during which 10% of the purchase price was paid.

[5] On 17 May 1974, the respondent demanded for the balance of the purchase price to be paid within seven days in view of the completion of the subdivision of the land. No payment was made by the appellant.

[6] On 3 June 1974, the respondent terminated the agreement and informed the respondent that the 10% deposit had been forfeited. However on 17 June 1974, the appellant paid the balance of the purchase price which was duly accepted by the respondent's solicitors.

[7] On 13 August 1974, the respondent pursuant cl 8(c) of the agreement requested for the sum of RM7,040 as part of the development costs. In view of non-payment of this development costs, the respondent on 25 September 1974 threatened to terminate the agreement again.

[8] In response to that threat, the appellant on 27 September 1974 requested for the title deed and confirmation of the development costs by the surveyors. The appellant did not respond to that request.

[9] On 3 May 1983, the title deed to the bungalow was issued and it is

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alleged that the appellant only knew of the issuance of the title on or about December 2004. Pursuant to this discovery, the appellant lodged a caveat on the title deed of the bungalow. On 17 November 2006, the appellant informed the respondent that he was ready and willing to pay what is lawfully due under the agreement.

[10] In view of the non-response of the respondent, the appellant took this legal action to claim for specific performance of the agreement.

THE HIGH COURT DECISION

[11] Before we set out what was decided by the High Court, we must set out what had happened prior to the final judgment dated 30 May 2013 as the appellant's main complaint relates directly to that event.

[12] This case came out for case management on 22 February 2012 before the learned judicial commissioner who directed with the consent of respective counsel that the issue of limitation be decided as a preliminary issue under O 14A of the Rules of the High Court 1980.

[13] Pursuant to that direction, respective counsel made their submissions and from the cursory reading of those submissions, it is quite clear that the learned judicial commissioner was faced with the sole issue of whether the appellant's statement of claim is time barred by the Limitation Act.

[14] On 6 April 2012, the learned judicial commissioner found in favor of the appellant and this is evident in her notes which reads as follows:

> application permohonan oleh Defendan berhubung isu had masa permohonan ditolak

[15] The effect of this dismissal is simply that the appellant's statement of claim is not barred by Limitation Act. The judgment of that decision was extracted in a form of a sealed order by the appellant.

[16] The trial started on 9 April 2012 and completed on the 30 May 2012 with the delivery of the court's decision and the grounds of the learned judicial commissioner.

[17] In her grounds, the learned judicial commissioner made certain findings which in our view were in favour of the appellant and in her last paragraph, she found that the appellant's suit is barred by the Limitation Act. She found that time started to run on 25 September 1974 which is the letter demanding for payment of the development costs of RM7,040 and in view of

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this action having started in 2007, 12 years had elapsed and hence time barred.

OUR GROUNDS OF DECISION

[18] The main ground of the appellant's appeal is simply whether the learned judicial commissioner was legally correct to allow the issue of limitation to be reopened at the trial despite the fact that she has decided on this issue as a preliminary issue in an O 14A application.

[19] The whole purpose of O 14A is to ensure that cases can be expeditiously disposed of by allowing questions of law or construction of any documents to be disposed summarily. In this manner, expenses and delay would be minimised. That said, it does not mean that any decision under O 14A is not a final decision and can be reopened at the trial.

[20] This is made clear in the case of *Hartecon JV Sdn Bhd v Hartela Contractors Ltd* [1996] 2 MLJ 57 where this court held as follows:

> (1) Once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and all parties to the list until its reversal on appeal. The decision of the judge overruling the respondent's preliminary objection rendered the point taken res judicata (see pp 65G and 66H); *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74 followed and *Harrison v Harrison* [1955] 1 Ch 260 distinguished.
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> (2) A failure to adhere to the principle of res judicata may lead to chaos in the conduct of the civil proceedings. In this case, on the assumption of the law made by counsel before the court, there would be re-review his second decision reversing himself. The process could then be repeated ad finitum with no conclusion (see p 66E).

[21] Accordingly we find that the learned judicial commissioner had erred in reversing her earlier decision on the issue of limitation of the appellant's cause of action. She is bound by her earlier finding.

CONCLUSION

[22] For reasons stated above, we allowed the appeal with costs in the cause and ordered that this matter be remitted back to the High Court for retrial on the premise that the appellant's cause of action is not time barred for reasons elaborated by us above.

[23] Our reason for remitting the matter back is simply that it is our view

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that there has been mistrial as the appellant had been prejudiced by the learned judicial commissioner's change of mind. In short justice demands that this matter be remitted back to the High Court. Further, the appellant's counsel had expressed no objection to this course of action.

[24] Finally we order that the deposit to be refunded to the appellant.

Appeal allowed with costs in the cause.

Reported by Kohila Nesan